POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

CARL INGRAM, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and ATLAS SAND AND ROCK, INC., Respondents.	PCHB NO. 06-016 ORDER DENYING STAY

On March 16, 2006, Carl Ingram (Appellant) filed an appeal with the Pollution Control Hearings Board (Board) challenging the Washington State Department of Ecology's (Ecology) issuance of a Findings of Fact and Order and a Report of Examination approving an application submitted by Atlas Sand and Rock (Atlas) for change, which added an additional place of use and point of withdrawal to Ground Water Permit G3-29338P (Permit).

Atlas has a lease agreement with Ingram, which allows Atlas to mine rock and gravel from Ingram's property in exchange for royalty payments. Atlas, who was previously assigned the Permit, seeks to withdraw and use water for mining purposes on properties adjacent to the Ingram property. Ingram claims that the granting of these changes will unlawfully impair his existing rights under the Permit, and that Atlas' Application for Change was legally defective and should not be approved.

Ingram filed a Motion to Stay Ecology's Order pending the outcome of the proceeding. The Board heard oral argument on the stay request on May 31, 2006, at the Board's offices in Lacey, Washington. John F. Bradach, Sr. represented Carl Ingram, Leslie Ann Birnbaum represented Ecology; and Thomas McDonald represented Atlas Sand and Rock, Inc. The Board was comprised of William Lynch, presiding, Kathleen Mix, and Andrea McNamara Doyle. The arguments were reported by Randi Hamilton of Gene Barker & Associates, Olympia, Washington.

In ruling on the stay motion, the Board considered the following materials:

1. Appellant's Motion to Stay Order.
2. Memorandum in Support of Appellant's Motion to Stay.
3. Affidavit of Carl Ingram in Support of Motion to Stay DOE Order and attached exhibits.
4. Affidavit of John F. Bradach, Sr., in Support of Motion to Stay DOE Order and attached exhibits.
5. Atlas Sand and Rock's Response to Appellant's Motion to Stay Ecology's Order to Change Permit No. G3-29338 and attached exhibits.
6. Declaration of Ron Jensen in Support of Atlas Sand and Rock's Response to Appellant's Motion to Stay DOE Order.
7. Amended Declaration of Ron Jensen in Support of Atlas Sand and Rock's Response to Appellant's Motion to Stay DOE Order.
8. Ecology's Response in Opposition to Appellant's Motion to Stay Order and attached exhibits.
9. Declaration of William Neve in Support of Ecology's Response in Opposition to Appellant's Motion to Stay Order.

10. Reply Memorandum of Appellant Carl Ingram in Support of Motion to Stay DOE Order.

11. Second Affidavit of John Bradach, Sr. in Support of Motion to Stay DOE Order and attached exhibit.

12. Appellant's Notice of Appeal.

Based upon the evidence submitted, the written material filed, and the arguments of counsel, the Board enters the following decision:

Factual Background

On February 11, 1992, Rob Courville[1] entered into a lease with Delores Ingram to mine gravel from the Ingram property in exchange for royalty payments and other consideration. The lease was modified on June 24, 1993, to require the payment of minimum monthly royalty payments. The lease was modified by interlineation in October 1997 to extend the term of the lease and to reduce the royalty payment from forty-five cents to thirty-five cents per ton of material removed from the premises. *Affidavit of Carl Ingram, Ex. A.*

On December 9, 1992, Rob Courville applied for a ground water right in the amount of 100 gallons per minute (gpm) for continuous mining use on Ingram's property. Mr. Courville signed the application as the permit applicant, and Dolores Ingram signed the application as the owner of the property. *Second Affidavit of John F. Bradach, Sr., Ex. C.* Mr. Courville wished to wash gravel mined at the site by means of a retention pond with water withdrawn from the well. The location of the well is approximately one mile west of Clarkston, Washington. *Affidavit of*

[1] Robert S. Courville and Joan L. Courville are also named and signed as lessees to this lease agreement.

Carl Ingram, Ex. C. Water right Permit No. G3-29338P was issued to Rob Courville on May 15, 1995, in the amount of 100 gpm and an annual quantity of 26.5 acre feet per year (afy). The Permit also indicates that a temporary permit issued for this application on September 31, 1993 was revoked upon the issuance of this permit. *Affidavit of Carl Ingram, Ex. B.* Ingram is not mentioned in the Report of Examination or Permit No. G3-29338P.

On January 24, 2002, the lease was assigned from the Courvilles to Atlas with the consent of the Ingrams. This lease assignment and modification indicates that Delores Ingram had previously sold her interest in the property to Carl and William Ingram, who became the lessors under the lease. One of the modifications to the lease required the lessee to "be responsible for maintaining all applicable permits related to the mining operation." *Affidavit of Carl Ingram, Ex. A, p.3.* This subsection also provides that following termination of the lease, all permits and licenses obtained for use in conjunction with the lease premises are to be transferred to the lessor. Section IV of the lease authorizes the lessee to drill water wells on the premises for use in connection with mining operations, but the lessee must leave the well and casing for the use of the lessor after the mining has ceased. *Id., p. 11.*

Rob Courville filed an assignment of the Permit to Atlas with Ecology on August 4, 2004. Ingram's name does not appear on this assignment. *Affidavit of Carl Ingram, Ex. D.* The date stamped on the Permit by Ecology recognizing the assignment from Rob Courville to Atlas is August 18, 2004. *Affidavit of Carl Ingram, Ex. B.*

Mr. Courville filed a Proof of Appropriation in June of 1995, which indicated that the full amount of water was put to beneficial use. However, Ecology conducted a proof of

examination in July 2004, and determined that the full beneficial use of the Permit was not fully perfected. *Atlas' Response, Ex. A.* Atlas chose to withdraw the Proof of Appropriation and applied for an extension to perfect the full beneficial use of water. On April 19, 2005, Atlas filed an application requesting a change in the place of use and an additional point of withdrawal to the Permit. The Appellant filed the only protest to the proposed change. Ecology issued a Findings of Fact and Order and a Report of Examination (ROE) approving a change in the place of use and adding a point of withdrawal to the Permit on February 16, 2006. On March 16, 2006, Carl Ingram filed this appeal with the Board.

Analysis

The Board's rules address the required showing for a stay at WAC 371-08-415(4):

> (4) The requester makes a prima facie case for a stay if the requester demonstrates either a likelihood of success on the merits of the appeal or irreparable harm. Upon such a showing, the board shall grant the stay unless the agency demonstrates either:
>
> (a) A substantial probability of success on the merits; or
>
> (b) Likelihood of success and an overriding public interest which justifies denial of the stay.

Likelihood of Success

The Board examined the meaning of the "likelihood of success on the merits" criteria for a stay in *Airport Communities Coalition v. Ecology*, PCHB No. 01-160 (Order Granting Motion to Stay Effectiveness of Section 401 Certification)(December 17, 2001):

> Likelihood of success on the merits means one or both sides have presented the Board with justiciable arguments for and against a particular proposition. Likelihood of success on

> the merits is not a pure probability standard under RCW 43.21B.320 and WAC 371-08-415(4). This standard does not require the moving party to demonstrate it will conclusively win on the merits, but only that there are questions 'so serious as to make them fair ground for litigation and thus more deliberative investigation.' The evaluation of the likely outcome on the merits is based on a sliding scale that balances the comparative injuries that the parties and non-parties may suffer if a stay is granted or denied. For example, where the non-moving party will incur little or no harm or injury if a stay is granted, then the moving party's demonstration of likelihood of success need not be as strong as where the moving party would suffer great injury.

(Citations omitted.)

In this case, Ingram has the burden of establishing the grounds for issuance of a stay. Ingram contends that Ecology failed to recognize Ingram's existing rights under the Permit by approving the request for change. Ingram asserts that Atlas will have less incentive to mine the Ingram's property if Atlas is able to mine adjacent property through the establishment of a new well and point of withdrawal. Ingram also asserts that Atlas' application for change was defective because it failed to include Ingram's signature as the landowner.

Ingram has not demonstrated a likelihood of success on the merits. Atlas is the holder of the water right because the Permit was assigned to Atlas by the Courville family. Ingram asserts that since water has been put to beneficial use under the Permit on Ingram's property, the accompanying appurtenancy to Ingram's property establishes an "existing right" to be protected from impairment.

RCW 90.03.380(1) does establish that water which has been applied to the land for a beneficial use remains appurtenant to the land on which it is used. Therefore, a purchaser of land also obtains the water right appurtenant to that land unless there is an express reservation. No additional approval is necessary for the purchaser to use the water on the land in the same

way that the seller used the water on the land. This same subsection, however, allows the water right to be transferred to another and become appurtenant to any other land if the change can be made without causing a detriment or injury to existing rights. The Washington Supreme Court has recognized that a ground water permit can be separated from the land upon which it was issued pursuant to RCW 90.03.380(1) if the requirements of RCW 90.44.100 are met. *Schuh v. Ecology*, 100 Wn.2d 180, 185, 667 P.2d 64 (1983). In *Haase v. Ecology*, PCHB No. 765 (1975) (Findings of Fact, Conclusions of Law and Order), the Board stated, "Rights to the ground water under a permit attach to the applicant for the permit who need not be the legal owner of the land." *Haase at 4*. This principle was recently reaffirmed by the Board in *Buck v. Ecology*, PCHB No. 06-018 (2006) (Order Granting Summary Judgment). The fact that Ingram owns the land upon which the ground water withdrawn under the Permit is currently used does not establish an "existing right" in the Permit. Furthermore, Ingram has not identified any authority to support his position that appurtenancy creates an ownership interest in a water right.

Ingram also asserts that the terms of the lease are incorporated into the Permit, and that Ecology is unnecessarily restricting the meaning of "existing rights" to include only existing water rights. Ingram ignores case law and Board decisions that have determined the impairment of "existing rights" to mean harm to other water rights. *R.D.Merrill Co. v. PCHB*, 137 Wn.2d 118, 128, 969 P.2d 458 (1999); *Okanogan Wilderness League v. Twisp*, 133 Wn.2d 777, 947 P.2d 732 (1997); *Big Creek Water Users Assoc. v. Ecology and Trendwest*, PCHB No. 02-113 (December 16, 2002) (Order Granting Summary Judgment). The Board rejects Ingram's reading of *Haberman v. Sander*, 166 Wn.2d 453, 7 P.2d 563 (1932); and *Schuh*, *infra*, as providing

support for an expanded construction of the term "existing rights." Both of these cases clearly pertain to impairment of the right to use water, and do not recognize some other ownership interest as giving rise to protection under the water codes.

The terms of the lease are governed by the law of contracts. The Board has no jurisdiction to consider the rights of the parties under the lease because the Board's authority is limited to certain decisions outlined in RCW 43.21B.110 and WAC 371-08-315. Neither of these provisions provides the Board any authority to determine the rights of parties under a contract dispute. In *Big Creek*, the Board stated that it had no jurisdiction to answer questions of partnership or contract. *Big Creek at 9.* The rights under a lease or contract are not protected as existing rights under the water codes. If Ingram believes that a breach of the lease has occurred, this is an action separate from the issuance of the water permit and may be pursued in superior court.

Irreparable Harm

Ingram has not shown that will suffer irreparable harm if the stay is not granted. In fact, Ingram has not produced any evidence of harm or injury other than to speculate that there could be an economic impact if Atlas chooses to mine on adjacent property rather than the Ingram property. Atlas may still use water on the Ingram property. Even if there is harm to Ingram that can be demonstrated as a result of the granting of the change application, Ingram can pursue contract remedies by filing an action in superior court based upon a breach of the lease.

Ingram also argues that Ecology violated the governing statutes by approving Atlas' application for change without securing Ingram's signature. Ingram asserts that the application for change also contains false statements by Atlas and is missing necessary information. Ingram's arguments are not well-taken. WAC 508-12-130 requires the signature of the owner of the land on which the water *will be used*. There is no requirement to obtain the signature of the land owner of the property where the water is currently used. As discussed earlier, Ingram has no ownership right to the water under the Permit. Therefore, Ingram's signature is not required on the application for change. The Board also does not find the statement on the application that Atlas owns the well to be false since any ownership interest in the well by Ingram appears to arise only after the cessation of mining activities under the lease. Nothing raised by Ingram regarding the information contained or lacking on the application for change justifies the issuance of a stay.

Because Ingram failed to show a prima facie case for the issuance of a stay, the Board does not need to consider whether the Respondents have shown a substantial likelihood of success on the merits or an overriding public interest.

The parties previously agreed that if the stay motion is not granted, the August hearing dates would be canceled and the hearing would be held on October 4-5, 2006.

ORDER

The Appellant's motion for a stay of Ecology's decision and order to change water permit No. G3-29338P is hereby DENIED. This matter will proceed to the hearing on the merits on October 4-5, 2006.

SO ORDERED this 17th day of August 2006.

POLLUTION CONTROL HEARINGS BOARD

WILLIAM H. LYNCH**,** Presiding

KATHLEEN D. MIX, Member

ANDREA MCNAMARA DOYLE, Member